

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE HOLLI LUNDAHL,  
  
Debtor.

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BAP No. UT-04-005

HOLLI LUNDAHL,  
  
Plaintiff – Appellant,  
  
v.

Bankr. No. 03T-21660  
Adv. No. 03PT-2351  
Chapter 13

ORDER DENYING MOTION

March 11, 2004

PAUL EVES, JOYLENE EVES, ROBERT  
HAMMON, BENLEY WILSON,  
CONNIE SMITH JOLLEY, HIDDEN  
VALE MGT. CO., INC., and DOES 1  
THROUGH 100,  
  
Defendants – Appellees.

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Before McFEELEY, Chief Judge, MICHAEL, and NUGENT, Bankruptcy Judges.

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The matter before the Court is the “Motion to Reconsider, or in the Alternative, to Recall the Mandates of the Dismissals of Appeal Case Nos. UT-04-003, UT-04-004, and UT-04-005 – for Failure to Prosecute, on the Previously Noticed Grounds That No Final Appealable Orders Were Entered by the Magistrate Judge and Therefore this Appellate Panel Lacked Subject Matter Jurisdiction to Entertain the Notices of Appeals and Reach Any Disposition on the Merits” (“Motion”), filed February 24, 2004, by the Plaintiff – Appellant.

No response to the Motion has been filed by the Defendants – Appellees. However, it does not appear that the Motion was served on the Defendants – Appellees. The certificate of service accompanying the Motion states that the Motion was served on the Honorable William T. Thurman. Judge Thurman is not a party to this appeal and not a proper recipient of service. The Court could strike the Motion for failure to

comply with Fed. R. Bankr. P. 8008, which requires that copies of all papers be served on all other parties to the appeal. However, review of the Motion indicates that a response of the Defendants – Appellees is not necessary for the Court to decide the Motion.

### **Background**

On December 24, 2003, in the above-captioned adversary proceeding, the United States Bankruptcy Court for the District of Utah entered an order dismissing the adversary proceeding. On January 5, 2004, the Plaintiff – Appellant timely filed a notice of appeal to this Court. The notice of appeal was not accompanied by the required filing and docketing fees. The Plaintiff – Appellant filed an Application to Proceed Without Prepayment of Fees and Affidavit, which was denied by order entered January 13, 2004.

On January 9, 2004, this Court issued a Notice That Appeal Has Been Docketed, which set forth applicable deadlines for prosecution of this appeal. The Plaintiff – Appellant was required to file with this Court by January 20, 2004, the following papers: (1) a statement of interested parties pursuant to 10th Cir. BAP L.R. 8018-3, and (2) a designation of record and statement of issues pursuant to Fed. R. Bankr. P. 8006 and 10th Cir. BAP L.R. 8006-1(b). The deadline expired, and the required papers were not filed.

On January 22, 2004, this Court issued a Notice of Deficiency and Order to Show Cause, which noted that the Plaintiff – Appellant had not filed the required papers and warned that the appeal would be dismissed for failure to prosecute if the papers were not filed within 10 days. That deadline expired, and the required papers were not filed. On February 3, 2004, this Court dismissed the appeal for failure to prosecute.

On February 6, 2004, the Plaintiff – Appellant filed with this Court a “Notice of Election to Proceed on Appeal in the District Court Pursuant to 28 USC Section 158(c) Given Order Denying Application to Proceed Without Prepayment of Fees” (“Election”).

As discussed below, the Election was not timely filed. Further, the appeal had been dismissed three days prior to the filing of the Election. This Court therefore took no action on the Election.

On February 17, 2004, this Court issued its mandate. The Motion was filed February 24, 2004. The statement of interested parties, designation of record, and statement of issues have still not been filed. The filing and docketing fees have not been paid.

### **Discussion**

The Motion contends that this Court lacks jurisdiction over this appeal because the bankruptcy court did not have the jurisdiction to enter the order dismissing the adversary proceeding and requests that this Court recall its mandate, vacate the dismissal order entered February 3, 2004, and dismiss the appeal for lack of jurisdiction.

This Court has jurisdiction over this appeal under 28 U.S.C. § 158(a). The bankruptcy court's December 24, 2003 order dismissing the adversary proceeding is a final order. *See In re T.E.C. Resources*, 302 B.R. 113 (10th Cir. BAP 2003). The Plaintiff-Appellant's jurisdictional argument fails as it is a collateral attempt to argue the merits of her appeal.

The Plaintiff-Appellant's argument that she made a proper election also fails. As provided in 28 U.S.C. § 158(a):

each appeal under subsection (a) shall be heard by a 3-judge panel of the bankruptcy appellate panel service established under subsection (b)(1) unless –

- (A) the appellant elects at the time of filing the appeal; or
- (B) any other party elects, not later than 30 days after service of the notice of the appeal;

to have such appeal heard by the district court.

28 U.S.C. § 158(c). The Election filed by the Plaintiff – Appellant was filed over a

month after the filing of the notice of appeal and was untimely under subsection (A).<sup>1</sup> It was therefore appropriate for this Court to take no action on it, especially given the fact that the appeal had been dismissed three days earlier.

The Plaintiff – Appellant claims that she was not served with this Court’s orders. However, this Court’s records reflect that copies of each order were mailed to her at the address she provided. To the extent that address is incorrect, it is the responsibility of the Plaintiff – Appellant to notify this Court. The Court notes that no orders were returned as undeliverable by the United States Postal Service.<sup>2</sup>

The appeal was properly dismissed for failure to prosecute, a deficiency that has not been cured to date. This Court’s mandate issued on February 17, 2004, pursuant to 10th Cir. BAP L.R. 8016-3. Recalling the mandate requires “extraordinary circumstances.” *Payne v. Clarendon Nat’l Ins. Co. (In re Sunset Sales, Inc.)*, 222 B.R. 914, 917-18 (10th Cir. BAP 1998), *aff’d*, 195 F.3d 568 (10th Cir. 1999). The Motion makes no such showing.

### **Conclusion**

Accordingly, for the reasons stated above, the Motion is DENIED.

For the Panel:

Barbara A. Schermerhorn, Clerk of Court

By:



Deputy Clerk

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<sup>1</sup> The Plaintiff – Appellant claims that she was not aware of the deadline for filing an election and claims that it is not listed in Fed. R. Bankr. P. 8001. The Court notes that the rule clearly states that an election must be filed “within the time prescribed by 28 U.S.C. § 158(c)(1).” Fed. R. Bankr. P. 8001(e). The Court further notes that there is no exception in the rule for those who had no knowledge of the rule.

<sup>2</sup> Additionally, the Motion notes that the Plaintiff – Appellant has checked the status of her case on PACER. To the extent the Plaintiff – Appellant has access to PACER, she has access to an Adobe Acrobat “pdf” copy of every order entered by this Court in this appeal.